

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.10.2012

C O R A M

THE HONOURABLE MR.JUSTICE G.RAJASURIA

A.S.No.701 of 2009

A.M.Adhil Badusha

.. Appellant (Plaintiff)

vs.

1. Sucharitha Anand

2. K.Satish Kumar

.. Respondent (Defendants)

Appeal filed as against the judgment and decree dated 03.04.2009 passed by the learned District Judge, Nilgiris at Udhagamandalam in O.S.No.2 of 2008.

For Appellant : Mr.V.Raghavachari

For respondents : Mrs. R.Gowri for R1
Ms.P.Mahalakshmi for R2

JUDGMENT

Animadverting upon the judgment and decree dated 03.04.2009 passed by the learned District Judge, Nilgiris at Udhagamandalam in O.S.No.2 of 2008, the plaintiff has preferred this appeal.

2. For convenience sake, the parties are referred to here under according to their litigative status and ranking before the trial Court.

3. Compendiously and concisely, the germane facts absolutely necessary for the disposal of this appeal would run thus:

a] The plaintiff filed the suit for specific performance seeking the following reliefs:

To pass a decree and judgment against the defendants-

a) The specific performance of the suit agreement directing the defendants to execute the sale deed in respect of the suit schedule property within a time to be specified by this court failing which this court may be pleased to execute the same in favour of the plaintiff.

b) directing the defendant to deliver vacant possession

of the suit schedule property as a consequential relief of specific performance.

c) and for costs.

(extracted as such)

b] D1 and D2 filed the written statements separately resisting the suit.

c] The trial court framed the relevant issues.

d] Up went the trial, wherein the plaintiff examined himself as P.W.1 and marked Exs.A1 to A9; on the side of the defendants' D.Ws.1 to 3 were examined and Ex.B1 was marked and Exs.X1 and X2 also were marked.

e] Ultimately, the trial court dismissed the suit.

4. Being aggrieved by and dissatisfied with the judgment and decree of dismissal of the suit, the plaintiff has preferred this appeal on various grounds.

5. The nitty gritty, the pith and marrow of the averments in the plaint would run thus:

D2, is the Power of Attorney of D1. D2 and the plaintiff entered into the suit agreement to sell as contained in Ex.A1; whereby, the former on behalf of D1, who is the owner of the suit property, agreed to sell the same in favour of the latter, the plaintiff an extent of 1.10 acres of land out of the total extent of 4.64 acres of land in R.S.No.248/1 in Ootacamund town for a total consideration of Rs.5,50,000/-; a sum of Rs.5,00,000/- was paid as advance under the said agreement dated 03.07.2006 and the time stipulated for performance was six months. Before the expiry of six months, the plaintiff issued Ex.A2 notice dated 29.12.2006 calling upon the defendants to come forward to execute the sale deed on receiving the remaining sale consideration of Rs.50,000/-. However, there was no response by the defendants. Whereupon, another notice under Ex.A5 dated 05.09.2007 was sent to the defendants, which also evoked no response. Ultimately, the plaintiff filed the suit seeking specific performance.

6. Per contra, challenging and impugning the averments/allegations in the plaint, D1 filed the written statement, the sum and substance of the same would run thus:

(i) Albeit D2 filed the written statement separately, there are certain versions, which are common in both the written statements, which could summarily be set out thus:

The agreement to sell was not intended to be acted upon as such. It emerged only as a security for the prompt repayment of the loan amount of Rs.5,00,000/-, which D2 on behalf of D1 borrowed from the plaintiff for the purpose of ameliorating the suit property by carving it into plots and selling them to third parties. In fact with the help of developers, the defendants got developed the land concerned and sold as plots to several persons, who raised constructions. All along the plaintiff was keeping quite and he had not raised his little finger as against it due to the reason that the said Ex.A1 was not an agreement to sell at all. In response to the pre-litigation notice, the defendants informed the plaintiff and explained the true position and the plaintiff also accepted the real purport of Ex.A1; whereupon alone no written reply was given by the defendants to Exs.A2 and A5.

(ii) D2 in his separate written statement would also proceed to detail and delineate certain facts to the effect that there were lot of financial transactions between D2 and the plaintiff and the suit transaction was one in that line and the plaintiff cannot try to exploit the situation and gain out of it.

Accordingly, D1 and D2 prayed for the dismissal of the suit.

7. Heard both sides.

8. The learned counsel for the appellant/plaintiff would advance his arguments, which could pithily and precisely be set out thus:

- The trial court miserably failed to appreciate the true purport of Ex.A1. It is not that for the first notice the defendants failed to reply; but for the second notice also they did not reply.

- Preponderance of probabilities would govern the adjudication in civil cases. In this case, albeit the plaintiff had sent notice with the specific averment that Ex.A1 was an agreement to sell, which was intended to be acted upon and that the defendants were backing out of their commitment, the defendants simply kept quite. They lying through their teeth and in order to camouflage and conceal the draw back in their case, as a stooge they would come forward with a plea as though they personally informed and explained the facts to the plaintiff. As such, the defence of the defendants, is ex facie and prima facie untenable and no one could digest the same.

- The plaintiff never connived or acquiesced at the ameliorations carried out in the suit property. D1 was the owner of a large extent of land and by metes and bounds she agreed to sell the suit property. A plan also is found attached to the agreement and in such a case, the trial court was not justified in simply ignoring the

real purport of the agreement to sell and treat it only as a security document as though emerged for securing the prompt repayment of the loan by the defendants in favour of the plaintiff.

- Precisely, there is no evidence to demonstrate and display that before filing of the suit itself, the developments in the land took place and that the plaintiff was conniving at it. In view of the cordial relationship that existed between the parties, the plaintiff was hopeful that the defendants would execute the sale deed; but to his disappointment and dismay they were not responsive, which resulted in the filing of the suit and the trial court simply threw the baby along with the bath water.

- The rest of the arguments of the plaintiff would be adverted to infra at the appropriate place.

9. In a bid to torpedo and pulverise the arguments as put forth and set forth on the side of the plaintiff, the learned counsel for the defendants would pyramid her arguments, the pith and marrow of the same would run thus:

- The trial court extracted the relevant portions of the admissions made by the plaintiff himself as PW1 to the effect that he knew about the developments going on and that he did not object to it, and rendered the judgment, warranting no interference in the appeal.

- On receipt of the pre-suit notices, the defendants explained to the plaintiff, the real position, for which he agreed and that was why no written replies were given.

- At the time of emergence of Ex.A1, the agreement to sell, there were lanes or service roads or any developments and it was only a tea estate, which was admitted by the plaintiff himself as PW1. As such, the demarcations as found in the plan attached to Ex.A1 are nothing but imaginary ones and undue importance cannot be attached to it.

The rest of the arguments of the learned counsel for the defendants would be adverted to infra in the appropriate place.

10. The points for consideration are as under:

1. Whether the trial court was justified in treating Ex.A1 as a mere security document emerged for the prompt repayment of the loan of Rs.5,00,000/- borrowed by D2 on behalf of D1 from the plaintiff, ignoring the fact that no reply was given to the pre-suit notices under Exs.A2 and A5 sent by the plaintiff to the defendants and that defendants themselves had not issued any notice expressing their willingness to repay the alleged loan?

2. Whether Ex.A1 in stricto sensu could be considered as an agreement to sell at all and if so, whether, the plaintiff was ready and willing to perform his part of the contract?

3. Whether the conduct of the plaintiff could be termed as one falling foul of Sections 16 and 20 of the Specific Relief Act?

4. Whether there is any perversity or illegality in the judgment and decree of the trial court?

11. At the outset itself, I would like to fumigate my mind with the following decisions of the Hon'ble Apex Court:

(i) AIR 1960 SC 335 (Rukhmabai vs. Lala Laxminarayan and others) and an excerpt from it would run thus:

"5. There is a presumption in Hindu law that a family is joint. There can be a division in status among the members of a joint Hindu family by refinement of shares which is technically called "division in status", or an actual division among them by allotment of specific property to each one of them which is described as "division by metes and bounds". A member need not receive any share in the joint estate but may renounce his interest therein, his renunciation merely extinguishes his interest in the estate but does not affect the status of the remaining members vis-a-vis the family property. A division in status can be effected by an unambiguous declaration to become divided from the others and that intention can be expressed by any process. Though prima facie a document clearly expressing the intention to divide brings about a division in status, it is open to a party to prove that the said document was a sham or a nominal one not intended to be acted upon but was conceived and executed for an ulterior purpose. But there is no presumption that any property, whether movable or immovable, held by a member of a joint Hindu family, is joint family property. The burden lies upon the person who asserts that a particular property is joint family property to establish that fact. But if he proves that there was sufficient joint family nucleus from and out of which the said property could have been acquired, the burden shifts to the member of the family setting up the claim that it is his personal property to establish that the said property has been acquired without any assistance from the joint family property."

(ii) (2009)5 SUPREME COURT CASES 713 - VIMAL CHAND GHEVARCHAND JAIN AND OTHERS VS. RAMAKANT EKNATH JADOO, certain excerpts from it would run thus:

"36. If the appellants were able to prove that the deed of sale was duly executed and it was neither a sham transaction nor represented a transaction of different character, a suit for recovery of possession was maintainable. A heavy onus lay on the respondent to show that the apparent state of affairs was not the real state of affairs. It was for the defendant in a case of this nature to prove his defence. The first appellate Court, therefore, in our opinion, misdirected itself in passing the impugned judgement insofar as it failed to take into consideration the relevant facts and based its decision on wholly irrelevant consideration.

37. A heavy burden of proof lay upon the defendant to show that the transaction was a sham one. It was not a case where the parties did not intend to enter into any transaction at all. Admittedly, a transaction had taken place. Only the nature of transaction was in issue. A distinction must be borne in mind in regard to the nominal nature of a transaction which is no transaction in the eye of the law at all and the nature and character of a transaction as reflected in a deed of conveyance. The construction of the deed clearly shows that it was a deed of sale. The stipulation with regard to payment of compensation in the event the appellants are dispossessed was by way of an indemnity and did not affect the real nature of transaction. In any event, the said stipulation could not have been read in isolation. The judgement of the first appellate Court was, therefore, perverse. The High Court, thus, failed to consider the real dispute between the parties."

(iii) (2009) 7 MLJ 640 - S.ANDAL AND ANOTHER VS. K.CHINNASAMY, certain excerpts from it would run thus:

"22. Learned counsel for the respondent argued that the amount of Rs.4 lakhs has been borrowed for the purpose of discharging the loan to the Bank as well as to others from whom the respondent borrowed money for the purpose of marriage of three daughters. Of course, a part of the amount of Rs.1,60,000/- has been established to be paid to the Bank by evidence. But in respect of the balance amount, there is no acceptable evidence to support the contention. The respondent also has not established before the trial Court as well as before us when the daughters were got married and what was the amount borrowed and what was the amount unpaid during the relevant period of time when Exhibit P-1 was executed. Even assuming that the

existence of the loan is true, the loan would have been paid back out of the sale consideration. We are of the view that there is no material worth consideration made available to accept the contention of the respondent that the Exhibit A-1 agreement was entered into with an intention not to act upon it and only for securing the loan borrowed."

A mere running of an eye over the aforesaid precedents would amply make the point clear that even though there might be a registered instrument evidencing a particular transaction yet the parties are at liberty to adduce evidence to show that such a registered document was not intended to be acted upon.

12. Wherefore, it has to be seen as to whether satisfactorily, the defendants who pleaded that Ex.A1 was not intended to be acted upon, proved the said plea. The onus probandi so far as this plea was concerned, was on the defendants to prove it because by marking Ex.A1, ex facie and prima facie, the plaintiff established that the transaction was relating to the agreement to sell. The defendants only took up the specific plea that Ex.A5 was not intended to be acted upon, but it was only a security document.

13. Hence, it has to be seen as to whether the defendants discharged their burden of proof. D1 did not appear as a witness and only her husband was examined. At this juncture, I would like to recollect the dicta as found reflected in the following decisions of the Hon'ble Apex Court.

(i) (1999) 3 SCC 457 [Iswar Bhai C.Patel vs. Harihar Behera]. Certain excerpts from it would run thus:

Applying the principles stated above to the instant case, it would be found that in the instant case also the appellant had abstained from the witness-box and had not made any statement on oath in support of his pleading set out in the written statement. An adverse inference has, therefore, to be drawn against him. Since it was specifically stated by Respondent 2 in his statement on oath that it was at the instance of the appellant that he had issued the cheque on the account of Respondent 1 in Central Bank of India Ltd., Sambalpur Branch and the appellant, admittedly, had encashed that cheque, an inference has to be drawn against the appellant that what he stated in the written statement was not correct. In these circumstances, the High Court was fully justified in decreeing the suit of Respondent 1 in its entirety and passing a decree against the appellant also.

(ii) (1999) 3 SCC 573 [Vidhyadhar vs. Manikrao at page 583:

16. It was Defendant 1 who contended that the sale deed executed by Defendant 2 in favour of the plaintiff was fictitious and the whole transaction was a bogus transaction as only Rs.500 were paid as sale consideration to Defendant 2. He further claimed that payment of Rs.4500 to Defendant 2 at his home before the registration of the deed was wholly incorrect. This plea was not supported by Defendant 1 as he did not enter the witness-box. He did not state the facts pleaded in the written statement on oath in the trial court and avoided the witness-box so that he may not be cross-examined. This, by itself, is enough to reject the claim that the transaction of sale between Defendant 2 and the plaintiff was a bogus transaction.

17. Where a party to the suit does not appear in the witness-box and states his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is not correct as has been held in a series of decisions passed by various High Courts and the Privy Council beginning from the decision in Sardar Gurbakhsh Singh v. Gurdial Singh¹. This was followed by the Lahore High Court in Kirpa Singh v. Ajaipal Singh² and the Bombay High Court in Martand Pandharinath Chaudhari v. Radhabai Krishnarao Deshmukh³. The Madhya Pradesh High Court in Gulla Kharagjit Carpenter v. Narsingh Nandkishore Rawat⁴ also followed the Privy Council decision in Sardar Gurbakhsh Singh case¹. The Allahabad High Court in Arjun Singh v. Virendra Nath⁵ held that if a party abstains from entering the witness-box, it would give rise to an adverse inference against him. Similarly, a Division Bench of the Punjab and Haryana High Court in Bhagwan Dass v. Bhishan Chand⁶ drew a presumption under Section 114 of the Evidence Act, 1872 against a party who did not enter the witness-box.

(iii) 2010(10) SCC 512 [Man Kaur (Dead) By L.Rs. v. Hartar Singh Sangha].

14. The nature of the plea taken by D1 is such that there were certain instances, within her exclusive knowledge; but, she had not chosen to appear before the court as contemplated under Section 106 of the Indian Evidence Act to establish it. Her contention was that Ex.A1 emerged on her behalf at the instance of D2 with the plaintiff,

purely concerning a loan transaction and she would also add that in response to the notice, she also explained the position orally to the plaintiff. When such was her case, she ought to have examined herself as a witness and subjected herself to cross examination; but she had not done so. In regard to those aspects are concerned, examination of D1's husband as DW1 would not cure the defect. D2 figured himself as DW2 and deposed in support of his written statement and he was cross-examined but his evidence cannot be a substitute for the evidence of D1. Wherefore, the learned counsel for the plaintiffs would throw the issue into light that the defendants lied through their teeth.

15. No doubt, there were certain facts, which transpired during trial, that certain ameliorations took place in the suit property. Precisely, there is no evidence on record to exemplify and convey as in which portion of the said extent of the suit property, amelioration took place. No commissioner was appointed, pending suit, in order to take note of the physical features. The very bed rock and back bone of the plea of the defendants, is that amelioration took place concerning which the plaintiff kept quite. In such a case, precisely, the defendants should have taken steps to get an Advocate Commissioner appointed to establish before the court the physical features; but that was not done.

16. When this court raised a query as to what were all the developments that took place in the suit property, precisely, there is no answer from the defendants' side. A mere running of the eye over the sale agreement Ex.A1, including the map attached to it would indicate and highlight that the area of the subject matter of the agreement to sell is, 1.10 acres and boundaries are also found specified therein. There is no knowing of the fact as to how many plots within that 1.10 acres of land are there; how many were sold etc. When such is the murky and cloudy position, the trial court was not justified in simply digesting the plea of the defendants that there were total ameliorations of the property and after converting the suit property into plots sold the same to third parties.

17. The learned counsel for the plaintiff would correctly and appropriately argue that still there are areas unsold and at least the plaintiff could be allowed to enjoy the same by having specific performance in respect of those areas/portions. He would also additionally pray that the purchasers also may be allowed to be impleaded so that he would be able to establish before the lower court on remand of the case, that they were not bona fide purchasers for value as they purchased certain portions, despite taking note of the registered agreement to sell Ex.A1. On behalf of his client, he would submit that the plaintiff would be satisfied with whatever extent available for him to get specifically enforced without any claim more as per Section 12 of the Specific Relief Act.

18. Whereas the learned counsel for the defendants would submit that the plaintiff cannot take steps to reopen the trial and try to gain something out of nothing as that Ex.A1 agreement itself was not the one intended to be acted upon.

19. As has been observed by me supra, there is no clear evidence on the side of the defendants to establish and prove that Ex.A1 emerged only by way of security. There is no gainsaying of the fact that Ex.A1 is a registered agreement to sell. An agreement to sell can be oral or even by an unregistered document. But, in this case, the parties took care to see that it was a registered one. When such is the position, there is no knowing of the fact as to what made the defendants not to give any reply to the notices, Exs.A2 and A5. The conduct of the parties should be taken note of for deciding cases of this nature. Simply because, the defendants took up the plea that the registered sale agreement was not intended to be acted upon, it cannot be accepted by this court and that too when there are defects in the case of the defendants as highlighted supra.

20. When this court raised a query to the learned counsel for the defendants as to whether within the stipulated period of six months in Ex.A1, the defendants tendered the sum of Rs.5,00,000/- by way of repayment of the alleged loan, she could not give any plausible answer to it. In fact, there is no scintilla or iota of evidence to connote or denote that the defendants tendered back the amount of Rs.5,00,000/- as contemplated in Ex.A1 to the plaintiff and there is no plea to that effect in the written statement also. In such a case, there is no knowing of the fact as to how the trial court accepted the plea of the defendants that it was only a loan transaction.

21. My mind is reminiscent and redolent of the following maxims:

(a) Verba generalia generaliter sunt intelligenda - General words are to be understood generally.

(b) Verba ita sunt intelligenda, ut res magis valeat quam pereat - Words are to be so understood that the matter may have effect rather than fail.

(c) Qui haeret in litera, haeret in cortice: One who clings to the letter clings to the shell or surface.

(d) Mala grammatica non vitiat chartum. Sed in expositione instrumentorum mala grammatica quoad fieri possit evitanda est - Bad grammar does not vitiate a deed. But in the exposition of instruments, bad grammar, as far as it can be done, is to be avoided.

Accordingly, if viewed, it is the duty of the court to see that the

document and the recitals contained therein are upheld, unless there is clinching evidence on the side of the party concerned to show that it is a document, which was not intended to be acted upon. Wherefore, pooh-poohing and discarding Ex.A1 would be next to impossibility.

22. Therefore, I am of the considered view that the onus of proof, which was on the defendants was not discharged by them. Wherefore, the court is enjoined to give importance to the agreement to sell as contained in Ex.A1. Accordingly, I hold that Ex.A1 is only an agreement to sell.

23. The next significant question, which arises for consideration is as to whether at this distant point of time, the plaintiff could be given the facility of depriving the third party purchasers of a part of the suit property?

24. I would like to point out that lis pendens purchasers of the suit property cannot take advantage of their purchases and the plaintiff will have superior right over them. However, such of those purchasers who purchased the plots before the filing of the suit, need not be disturbed. Even though the agreement to sell is a registered one, at this distant point of time, if such purchasers prior to the litigation were added, then that would lead to discomfiture, complications and also multiplicity of proceedings. Even, when the case was pending before the trial court, the plaintiff did not choose to add those purchasers as parties who anterior to the filing of the suit purchased some plots in the suit property.

25. Hence, I would like to make it clear that only the rights of the pendente lite purchasers and the defendants over the suit property would be subservient to the plaintiff's right under Ex.A1, the agreement to sell, which is enforceable to the extent of the suit property remaining unsold and also the portions, which were sold pendente lite.

26. I would like to extract here under Section 12 of the Specific Relief Act and the precedents emerged there under also.

"12. Specific performance of part of contract -

(1) Except as otherwise hereinafter provided in this section the court shall not direct the specific performance of a part of a contract.

(2) Where a party to a contract is unable to perform the whole of his part of it, but the part which must be left unperformed by only a small proportion to the whole in value and admits of compensation in money, the court may, at the suit of either party, direct the specific performance of so much of the contract as can be performed, and award

compensation in money for the deficiency.

(3) Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed either -

(a) forms a considerable part of the whole, though admitting of compensation in money; or

(b) does not admit of compensation in money;

he is not entitled to obtain a decree for specific performance; but the court may, at the suit of other party, direct the party in default to perform specifically so much of his part of the contract as he can perform, if the other party -

(i) in a case falling under clause (a) pays or has paid the agreed consideration for the whole of the contract reduced by the consideration for the part which must be left unperformed and a case falling under clause (b), [pays or had paid] the consideration for the whole of the contract without any abatement; and

(ii) in either case, relinquishes all claims to the performance of the remaining part of the contract and all right to compensation, either for the deficiency or for the loss or damage sustained by him through the default of the defendant.

(4) When a part of a contract which, taken by itself, can and ought to be specifically performed, stands on a separate and independent footing from another part of the same contract which cannot or ought not to be specifically performed, the court may direct specific performance of the former part."

1. (2001) 8 SCC 173 [Rachakonda Narayana vs. Ponthala Parvathamma and another]
2. (2005) 5 SCC 142 [Surinder Singh vs. Kapoor Singh (dead) through Lrs. and others]
3. AIR 1965 Madras 188 [A.L. Parthasarathi Mudaliar vs. Venkata Kondiah Chettiar]

I would also like to fruitfully refer to the Division Bench judgment of this court reported in 1996-2-L.W.836 [Mohamed Akbar Batcha Sahib vs. Y. Nagarajan] concerning moulding of the relief and granting the same in specific performance suits. Certain excerpts from it would run thus:

1."The purchaser filed an appeal in this court which was disposed of by a single Judge. The learned Judge held that the plaintiff is entitled to a decree for specific performance of the contract with reference to the undivided half share by the vendor on payment of one half of the total consideration. The learned Judge has exercised his power under O.7, R.7, C.P.C., to mould the relief prayed for by the plaintiff and grant appropriate relief and consequently, he set aside the direction given by the lower court for refunding the advance and passed a decree for specific performance with reference to the vendor's half share in the property on payment of Rs.7625.50 which represented the balance out of one half of the total consideration. The aggrieved defendant has filed this appeal while the plaintiff has preferred a memorandum of cross-objections.

8. It is seen from the above clause that the court can direct specific performance of the agreement with reference to the part which can be performed for consideration reduced by the amount for the part which has to be left unperformed. In this case, it is not in dispute that the defendant and his brother are equally entitled to the property and when the defendant is allowed to execute a sale deed with reference to his undivided half share, the consideration shall be reduced to a half and that is what has been done by the learned single Judge in the appeal.

9. We have no hesitation to hold that there is no merit either in the appeal or in the Memorandum of cross-objections. Hence, both are dismissed. There will be no order as to costs."

27. All those decisions would clearly show that as per Section 12(3) of the Specific Relief Act, the plaintiff, who seeks to avail the benefit under Section 12 (3) of the Specific Relief Act in respect of the smaller extent forming part of suit property, which is the subject matter of the agreement to sell, should part with the entire sale consideration in respect of the whole property and should forgo his right to claim compensation also in respect of the portion, which cannot be specifically enforced.

28. The learned counsel for the plaintiff by inviting the attention of this court to the receipt, which is found enclosed in the typed set of papers, would submit that the remaining sale consideration of Rs.50,000/- was also paid while the suit was pending before the trial court and thereby the entire sale consideration was paid by the plaintiff as per Ex.A1 and that his client would not make any claim for compensation as per Section 12 of the Specific Relief Act.

29. As such, it is crystal clear that the entire sale consideration of Rs.5,50,000/- as contemplated in Ex.A1 was already parted with by the plaintiff in favour of the defendants in one way or the other.

30. The next phase is to find out as to whether there is any laches or inaction on the part of the plaintiff in seeking specific performance.

31. Indubitably and indisputably, obviously and axiomatically, Ex.A1, the agreement to sell emerged on 03.07.2006 stipulating six months period for performance, which expired on 03.01.2007. However, Ex.A1 would indicate and exemplify that even before the expiry of such period, notice was sent admittedly by the plaintiff to the defendants and in such a case, that would clearly evince and evidence, express and expatiate, portray and project that there was no laches on the part of the plaintiff in seeking specific performance. Over and above that he issued second notice also. The same inertia in responding to the first notice by the defendants followed suit and the conduct of the defendants is deplorable. However, the plaintiff's conduct in appropriately sending notices before the filing the suit, bespeaks and betokens the genuineness and the interest of the plaintiff in getting the sale executed in his favour. Fruitfully the following precedents could be referred to:

(i) 2010(10) SCC 512 [Man Kaur (Dead) By L.Rs. v. Hartar Singh Sangha]; certain excerpts from it would run thus:

"40. This contention has no merit. There are two distinct issues. The first issue is the breach by the defendant vendor which gives a cause of action to the plaintiff to file a suit for specific performance. The second issue relates to the personal bar to enforcement of a specific performance by persons enumerated in Section 16 of the Act. A person who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him (other than the terms the performance of which has been prevented or waived by the defendant) is barred from claiming specific performance. Therefore, even assuming that the defendant had committed breach, if the plaintiff fails to aver in the plaint or prove that he was always ready and willing to perform the essential terms of contract which are required to be performed by him (other than the terms the performance of which has been prevented or waived by the plaintiff), there is a bar to specific performance in his favour. Therefore, the assumption of the respondent that readiness and willingness on the

part of the plaintiff is something which need not be proved, if the plaintiff is able to establish that the defendant refused to execute the sale deed and thereby committed breach, is not correct. Let us give an example. Take a case where there is a contract for sale for a consideration of Rs.10 lakhs and earnest money of Rs.1 lakh was paid and the vendor wrongly refuses to execute the sale deed unless the purchaser is ready to pay Rs.15 lakhs. In such a case there is a clear breach by the defendant. But in that case, if the plaintiff did not have the balance Rs.9 lakhs (and the money required for stamp duty and registration) or the capacity to arrange and pay such money, when the contract has to be performed, the plaintiff will not be entitled to specific performance, even if he proves breach by the defendant, as he was not "ready and willing" to perform his obligations."

(ii) (2011) 1 SUPREME COURT CASES 429 - J.P.BUILDERS AND ANOTHER V. A.RAMADAS RAO AND ANOTHER would run thus:

"27. It is settled law that even in the absence of specific plea by the opposite party, it is the mandate of the statute that the plaintiff has to comply with Section 16(c) of the Specific Relief Act and when there is non-compliance with this statutory mandate, the Court is not bound to grant specific performance and is left with no other alternative but to dismiss the suit. It is also clear that readiness to perform must be established throughout the relevant points of time. "Readiness and willingness" to perform the part of the contract has to be determined/ascertained from the conduct of the parties."

32. Wherefore, I am of the considered view that Section 12(3) (b) of the Specific Relief Act can rightly be pressed into service in favour of the plaintiff as there are no laches or inaction on his part which could be termed as one falling foul of Section 16 or Section 20 of the Specific Relief Act.

33. In the wake of the analysis and evidence and in the light of the aforesaid decisions of the Hon'ble Apex Court, it is crystal clear that the court is having no other go but to order specific performance. The pleas of the defendants are nothing but red hairings let loosed in the litigative process to bemuse and befuddle the plaintiff, which this court cannot countenance and upheld as the ones capable of torpedoing the case of the plaintiff for specific performance at least to the area available for such relief.

34. On balance,

Point No.1 is decided to the effect that the trial court was justified in treating Ex.A1 as a mere security document emerged for the prompt repayment of the loan of Rs.5,00,000/- borrowed by D2 on behalf of D1 from the plaintiff.

Point No.2 is decided to the effect that Ex.A1 in stricto sensu could be considered as an agreement to sell and the plaintiff was ready and willing to perform his part of the contract.

Point No.3 is decided to the effect that the conduct of the plaintiff could not be termed as one falling foul of Sections 16 and 20 of the Specific Relief Act.

Point No.4 is decided to the effect that in view of the ratiocination adhered to in deciding point Nos.1 to 3, the judgment and decree of the trial court stood modified as observed above.

35. Accordingly, the judgment and decree of the trial court are set aside by allowing this appeal partly and I would like to pass the following order while remitting the matter back to the trial court:

1. Ex.A1 is held to be an agreement to sell in stricto sensu. By virtue of Section 12(3) (b) of the Specific Relief Act, the court is enjoined to enforce specific performance in respect of the part of the suit property available for specific performance excluding the portions already sold by the defendants anterior to the filing of the suit.

2. Lis pendens purchasers would not be entitled to any relief and the plaintiff can enforce his right of specific performance in respect of the suit property as against the pendente lite purchasers as well as the defendants.

3. In order to carry out the mandates as contained in Section 12 of the Specific Relief Act, the trial court shall do well to see that an Advocate Commissioner is appointed to measure the suit property with the help of a Government Surveyor and to take physical features of it and submit a report.

4. Both sides are at liberty to adduce additional evidence for carrying out the mandates in this judgment. Whereupon the lower court shall pass a decree in respect of the said extent concerned for specific performance without insisting for any more deposit of money, because the entire sale consideration was paid by the plaintiff, so to say, partly by paying Rs.5,00,000/- lakhs to the defendants in person and by depositing the remaining sale consideration in court vide challan No.127308 dated 22.01.2008 for a sum of Rs.50,000/-

5. Both parties shall appear before the trial court on 19.11.2012. The trial court shall do well to see that the matter is disposed of within a period of six months from the date of receipt of this order.

Sd/
Asst.Registrar

//True Copy//

Sub.Asst.Registrar

vj2

To

1.The District Judge, Nilgiris at Udhagamandalam

2.The Section Officer, V.R.Section, High Court, Madras

1 cc to Mr.V.Raghavachari , Advocate, Sr.No.62712

1 cc to Mr.R.Gowri , Advocate, Sr.No.62449

A.S.No.701 of 2009

ug(co)
pmk.17.10.2012



WEB COPY